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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 24.

THE UNITED STATES, APPELLANTS,

v.

THE OFFICERS AND CREW OF THE U. S. S. MANGROVE.

No. 34.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. NEW YORK, U. S. S. INDIANA, AND U. S. S. WILMINGTON,

v.

THE OFFICERS AND CREW OF THE U. S. S. MANGROVE.

BRIEF AND ARGUMENT FOR THE OFFICERS AND MEN OF THE U. S. S. INDIANA.

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WILLIAM B. KING,
Proctors for the U. S. S. Indiana.

ANALYSIS OF ARGUMENT.

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BRIEF AND ARGUMENT FOR THE OFFICERS AND MEN OF THE U. S. S. "INDIANA."

PART I.

INTRODUCTORY.

STATEMENT OF THE CASE.

These are appeals from the decree of the district court of the United States for the southern district of Florida, distributing the proceeds of prize in the Spanish steamer *Panama*, captured in the Spanish-American war. The decree of condemnation of the vessel was affirmed by this court in the case of *The Panama* (176 U. S., 535).

The U. S. S. *Mangrove* claims to have been the sole captor; other vessels, the *Indiana*, *Wilmington*, and *New York*, claim to share as captors within signal distance

under Revised Statutes, section 4632. The district court rendered its decree in favor of the *Mangrove* as sole captor and, finding that the *Mangrove* was of inferior force to the *Panama*, decreed the whole amount of prize to the *Mangrove*. By Revised Statutes, section 4630, the United States receives one-half the proceeds if the "vessel or vessels making the capture" are equal or superior to the prize. From this decree the *Indiana*, *New York*, and *Wilmington* have appealed on the ground that they are entitled to share. The United States has also appealed on the ground that the capturing force was superior to the *Panama*, contending (1) that one of the other vessels assisted in the capture, making a superior force, and (2) that the *Panama* was itself inferior in force to the *Mangrove* if that vessel alone made the capture.

This brief is presented on behalf of the *Indiana*, but the interests of the United States and of the *Indiana* are identical on the question whether the *Indiana* is entitled to share.

ASSIGNMENT OF ERROR.

For error in the decree and judgment of the court below, these appellants say that the court erred:

I. In finding that the U. S. S. *Indiana* was not within signal distance of the U. S. S. *Mangrove* at the time of the capture.

II. In refusing to include the U. S. S. *Indiana* as a vessel entitled to share in the proceeds of the prize.

PRIOR PROCEEDINGS.

This case has once been before this court on a motion for leave to take further proof on behalf of the ap-

pellants, the record then consisting of 70 pages. On April 15, 1901, the court, on motion of the appellants, authorized further proofs. Depositions have been taken of 19 witnesses for the *Indiana*, 1 for the *New York*, and 14 for the *Mangrove*, and additional documentary evidence has been presented. This is separately printed as "Additional evidence," comprising 269 pages. The original record will be referred to as "rec.;" the additional evidence as "add."

ARGUMENT

THE ISSUE.

The right of the *Indiana* to share in the distribution of this prize money is governed by section 4632 of the Revised Statutes, as follows:

> All vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize. * * *

The issue between the *Mangrove* and *Indiana* is whether the *Indiana* was "within signal distance of the vessel making the capture."

The learned district judge, in deciding this case, states correctly the nature of this issue as follows (Rec., 53):

> Under our prize law the determination of what vessels are entitled to share in prize money for a capture becomes simply a question of fact. The statute is binding upon the courts, and declares positively that those vessels within signal distance and so situated that they can render assistance if required shall share.

This renders unnecessary any examination of the older British cases on constructive captors. These were very elaborately considered by Sprague, district judge, in *The Cherokee* (5 Fed. Cas., 550; 2 Spr., 235), and the same conclusion reached as stated above in regard to the issue under the statute of the United States.

As a general rule, signal distance will permit the interchange of signals, but conditions may exist where signals may be understood, if made on one vessel, by persons on the other vessel, but not *vice versa*. The test made by this statute is whether the claiming vessel was within signal distance of the capturing vessel; that is, could the capturing vessel signal to the claiming vessel? This is the vital question, and not whether the claiming vessel could signal to the capturing vessel. We claim to have established both conditions here, but the former, the material point, by wholly uncontradicted evidence.

THE UNDISPUTED FACTS.

On April 25, 1898, the *Mangrove*, commanded by Lieut. Commander William H. Everett, and the *Indiana*, commanded by Capt. Henry C. Taylor, were a part of the blockading fleet in the vicinity of Habana. At 4.30 p. m. the *Mangrove* was signaled by the *Indiana* to come within hail. Between that and 5 o'clock the *Mangrove* started with mail from the *Indiana* for Key West. About 5.15 a strange steamer, which turned out to be the Spanish steamer *Panama*, was sighted from the *Indiana*, and shortly before 6 p. m. the

Indiana headed for her (*Indiana's* log, rec., 35). The *Mangrove*, nearer to this steamer, had also headed for her. Shortly before 6 o'clock the *Mangrove* fired three shots across the strange steamer's bow to bring her to. Both vessels stopped, and while they lay close together the *Mangrove* sent a boat to the *Panama*, with Ensign John H. Dayton, who took possession of the vessel as prize at 6.07. He remained there, and the boat and crew returned to the *Mangrove*. The two vessels then proceeded in the direction of the *Indiana*. (Depositions of Everett, rec., 31; Dayton, rec., 28; Palmer, rec., 33, and the *Indiana's* log, rec., 35.) The *Mangrove* made no signals to the *Indiana*. The *Indiana* at 6.07, when the capture was effected, was moving toward the *Mangrove* and *Panama*, and so continued until 6.45, when, arriving close by, she fired a shot across the bow of the *Panama*, and all three vessels stopped. A prize crew from the *Indiana* was sent aboard the *Panama*. (Same evidence and depositions of Decker, rec., 40, and Dawson, rec., 41.) The sunset at Habana on this day was 6.25 p. m. (add., 203). The atmosphere was clear. The *Indiana* was toward the southwest and the rays of the sun were thrown from behind the *Indiana* toward the *Mangrove*. (Munson, add., 193, q. 46; 194, q. 55; Taylor, add., 65; Waller, add., 266.) The foregoing statement is, we think, accepted by all parties as correct.

It is assumed that the time of the capture is the time (6.07) when Ensign Dayton went aboard the *Panama* from the *Mangrove* (add., 105, q. 5; 122, q. 3).

THE SCOPE OF THE DISCUSSION.

Much of the evidence is contradictory, and to determine the question whether the *Indiana* was within signal distance of the *Mangrove* the following and other primary facts must be discussed in course of the argument:

What was seen on each vessel from the other.

The distance between the vessels at 6.07.

The rates of speed of the vessels between 6.07 and 6.45.

The time elapsing from the capture to the starting of the two vessels for the *Indiana*.

The distance at which signals can be understood.

The availability of gun signals.

The bearing of these facts on the question of signal distance will appear as the evidence is discussed.

THE EVIDENCE CLASSIFIED.

The evidence will be considered in the following order:

I. The evidence from the *Indiana* to show that visual or sound signals made on the *Mangrove* could have been understood on the *Indiana*.

II. The evidence from the *Mangrove* and *Panama* on the question whether signals from the *Indiana* could have been understood on the *Mangrove*.

This bears secondarily and inferentially on the question whether signals from the *Mangrove* could have been understood on the *Indiana*.

III. The evidence of speed and distance relied upon by the court below or by the *Mangrove* here, to show that the *Indiana* was beyond recognized signal distance.

Part II.

OBSERVATIONS FROM THE INDIANA.

THE WITNESSES.

The evidence on which the case of the *Indiana* depends to show that signals hoisted on the *Mangrove* could have been read from the *Indiana* consists of depositions of the following witnesses. The rank is given as held by them at the time.

In preparatorio:

	Page.
Lieut. Benton C. Decker, U. S. N. (rec.)	40
First Lieut. William C. Dawson, U. S. M. C. (rec.)	41

Under order of this court:

Capt. Henry C. Taylor, U. S. N. (add.)	57
Capt. Littleton W. T. Waller, U. S. M. C. (add.)	265
First Lieut. William C. Dawson, U. S. M. C. (add.)	3
Gunner George L. Mallery, U. S. N. (add.)	77
Chief Boatswain's Mate Michael Carlos, U. S. N. (add.)	209
Gunner's Mate Alexander Coffee, U. S. N. (add.)	233
Quartermaster James Golden, U. S. N. (add.)	246
Machinist William J. Lee, U. S. N. (add.)	238
Machinist Thomas F. Burns, U. S. N. (add.)	258
Second-class Yeoman Howard A. Kimball, U. S. N. (add.)	251
Captain of Hold Charles Perkins, U. S. N. (add.)	83
Water Tender John Geary, U. S. N. (add.)	238
Seaman John H. Meehan, U. S. N. (add.)	263
Seaman Edward F. Maybaun, U. S. N. (add.)	254
Bugler Wayne Abbott, U. S. N. (add.)	221
Apprentice Joseph G. Lindsay, U. S. N. (add.)	227
Private W. C. Blackiston, U. S. M. C. (add.)	215

One witness on the *Indiana* was called for the *Mangrove*—Pilot Charles B. Munson (add., 189).

THE INDIANA SAW THE CAPTURE.

All these witnesses testify that they saw the *Mangrove* and the *Panama* before the capture and when the capture took place.

The brief evidence of Lieutenants Decker and Dawson in preparatorio (Rec., 40, 41) was such as to convince the district judge that the capture was visible from the *Indiana*. While he holds that the *Indiana* could not be seen from the *Mangrove*, he states that he is satisfied "that the latter could be seen, and was seen, from the bridge of the *Indiana* as testified to."

That fact being thus found on the meager record below, it is not to be disputed on the elaborate record here that the *Mangrove* could be seen and was seen from the *Indiana* at the time of the capture, 6.07 p. m., when the boat went from the *Mangrove* to the *Panama*. One of the 19 witnesses who testified to seeing the *Mangrove* was in the fighting top (Munson, add., 191, q. 12), one at the masthead (Golden, add., 247, qq. 10, 11), three (Captain Taylor, p. 60; First Lieutenant Dawson, p. 3, q. 5; Apprentice Lindsay, add., 228, qq. 9, 10) were on the bridge; the other 14 were on the deck. It may therefore be treated as positively established that the *Mangrove* was seen at that time from the deck as well as from the bridge.

EVIDENCE OF SIGNAL DISTANCE.

We proceed further and assert:

1. That signal flags, if hoisted on the *Mangrove* at 6.07, the time of the capture, could have been read on the *Indiana*.

2. That gun signals, if then made on the *Mangrove*, could have been understood on the *Indiana*.

To prove that signals could have been read on the *Indiana* if hoisted on the *Mangrove*, the witnesses were asked what they actually saw and heard, so as to afford a basis for comparison; their experience in reading signals, and finally their opinion whether they could have read signals if hoisted on the *Mangrove*. The testimony agrees in establishing the following facts:

(1) From the *Indiana* the witnesses saw a boat, 15 feet long, in the water going from one vessel to the other. Their recollection of details differs according to the use of a glass, the strength of the observer's eye, and his accuracy of recollection.

(2) They also either saw or heard the firing of one or more of the *Mangrove's* guns. Several of those who saw the gunfire saw not simply the smoke from the gun, but the horizontal jet of smoke shooting out from the gun, or the flame at the very instant of firing. Others heard the firing of the gun. The attention of some was attracted to the chase and capture by the sound of the gun.

(3) Some of the witnesses saw the shapes of objects on the *Mangrove* at the time.

(4) The witnesses all say that what they saw at the time convinced them that had the ordinary flag signals of the Navy been hoisted at this time on the *Mangrove*, such signals could have been read from the *Indiana*.

It is upon the testimony of all these witnesses, taken

in conjunction with the fact that the atmosphere was clear and the conditions favorable for reading signals at long distances, that we rely for the establishment of our case.

DETAILED EVIDENCE.

Some review of this evidence in detail is essential.

THE COMMANDING OFFICER.

The commanding officer of the *Indiana*, Capt. Henry C. Taylor, an officer then of nearly forty years' experience, gives evidence marked by care, accuracy, and candor. He says (add., 58):

> The principal points that I remember were seeing them approach each other, first. Next, the gun fired—one or more guns from the *Mangrove;* next, the appearance of a boat in the water between the two; next, the apparent steaming away of the prize from the *Mangrove*, causing me to fire a shot across her bow, as I feared the boat had not sufficient prize crew aboard to take possession of her; next, communicating by hailing by ordinary voice or by megaphone, and the putting of a prize crew on board from the *Indiana*. That is all I remember of the principal incidents.

As to the gun fire, he says (add., 58, 63):

> I saw the smoke shoot from the muzzle of the gun; I can not remember whether I heard the sound. It would not have impressed me after having seen the smoke, as light guns were frequently heard at that time, used to attract attention to signals and to hold up vessels to be searched. I do, however, remember seeing the smoke as it shot from the gun, quite distinctly.

Q. I would like to have you describe as definitely as you can just what you saw of the smoke, and of its motion.

A. I saw, as usual in such cases, a horizontal line of jet, or tongue of smoke shoot from the side of the *Mangrove* in the direction of the prize, and instantly afterwards it became a solid cloud of smoke which the wind blew away, loosing the form of a jet, line, or tongue (add., 58).

* * * * *

Q. Could you distinctly observe objects upon the *Mangrove* during the chase or was it simply the outlines of the ship? Could you see people moving about on the ship or anything of that sort?

A. I remember distinctly the shape of the small gun fired, my attention being attracted to that portion of the vessel; I remember distinguishing either that gun or some other object like it, which I supposed to be the gun which was fired (add., 63).

As to the boat in the water, he says (add., 58, 63, 64):

Q. Will you please state with like definiteness what you saw as to the boat in the water?

A. I saw the boat distinctly. I do not remember whether my attention was called to it first or whether I saw it without this notice; and I can not remember whether I used glasses, the regular binoculars, in seeing it distinctly; my impression is that I saw it first without binoculars and that I afterwards used binoculars and saw it more plainly. (Add., 58.)

* * * * *

Q. Well, could you see the people in this boat at all?

A. I saw that there were people in the boat; I do not think that I could have counted them or said how many. There was an indication that there was movement of the boat and that there were people in the boat. (Add., 63.)

* * * * *

Q. When you speak of "jet," doesn't that carry the idea of fire instead of smoke?

A. There is always some fire visible, but the question that was asked me was about the smoke; there is a moment, an instant, when the gun is fired when the smoke distinctly goes out in a straight line and almost immediately dissipates from that to the vague shape of a cloud, but in an instant it is wind blown, and in the heart of that jet of smoke there is a tongue of flame; it is not generally very plain in broad daylight. (Add., 64.)

His conclusions in regard to reading signals are (add., 59, 60):

Q. Please state whether, in your opinion, at the time when the boat was dispatched from the *Mangrove* to the *Panama*, the *Indiana* was within signal distance of the *Mangrove*.

A. Yes, within good signal distance. I did not doubt then, and I do not now, that any signal, either ordinary or extraordinary, would have been plainly perceived and recognized by us and answered by us.

Q. Was it light enough then to have used the ordinary day signals?

A. When I saw the gun, and when I saw the boat, yes—light enough for day signals.

Q. On what do you base your opinion that the *Indiana* was in signal distance?

A. Principally upon my observations of affairs as I stood upon the bridge of the *Indiana* and approached the *Mangrove* and her prize. In addition by many minor circumstances which led me at the time not to question the fact at all. Among these were the short time I had spent since leaving the *Mangrove*, by the slow speed at which the *Indiana* then habitually went, by reason of the defects and lack of repairs of her boilers and by the foulness of her bottom; these defects prevented any great speed at whatever expenditure of energy, and I was especially careful not to strain her by forcing her, because it was a question whether she could last out the war and be present in the engagements of the war if we were not especially careful of her. (Add., 59.)

* * * * *

Q. As you proceeded toward the *Mangrove* and the *Panama* after you saw the boat in the water, please state whether these two vessels continued in as plain sight as when you started.

A. After the boat was seen in the water the twilight began, and it progresses rapidly in those waters. Signaling would have been easy when the boat was in the water by day signals. (Add., 60.)

As to hearing gun signals, he says (add., 62, 64, 73):

Q. At the time when you saw the boat going from the *Mangrove* to the *Panama*, could gun

signals fired from the *Mangrove* have been heard on the *Indiana?*

A. I have no doubt that they could, but hearing them would not have been necessary, as they were plainly visible (Add., 62.)

* * * * *

Q. When you spoke of there having been no time when some signals couldn't have been received, do you have reference to flag signals—that there were times when flag signals could have been read?

A. I believe that they could have been read. I am certain that such signals as the firing of guns which we perceived afterwards would have been plainly perceived at any time. (Add., 64.)

* * * * *

Q. What I want to get at is whether you considered the usual acceptation of the term "signal distance" includes any distance at which you can hear a gun fired?

A. No positive answer can be given to that because guns are at times heard 80 to 100 miles away under rare conditions of atmosphere. But I can answer that very clearly by saying that I regard signal distance as being in the nature of things that distance at which you can perceive the calling of a consort for assistance and to be near enough to be in position to render it within a reasonable time. I believe that when that is brought down to questions of miles it is customary to say that when day signals can be read that that will be the test, but the actual point is whether you

can see that vessel and if she is in trouble, recognize the fact and go to her assistance.

Q. Do you consider that it would be a practical thing in time of war to use guns for making a telegraphic code signal in the same way that whistles are used?

A. With greater difficulty and more slowly than with whistles I believe it can be done.

Q. Is it done, to your knowledge, in any of the navies of the world?

A. I do not know, but I know that provisions are made and are carefully laid down. (Add., 73.)

THE SIGNAL OFFICER.

Admiral Taylor's testimony is confirmed by that of his signal officer (add., 3, qq. 4, 5), First Lieut. William C. Dawson, U. S. M. C., who was on the bridge with him. He testified both in preparatorio (Rec., 41) and upon examination by counsel (add., 3).

As to the boats in the water he says (add., 5, q. 13):

I saw a boat in the water between the *Mangrove* and the *Panama*. I did not see the boat lowered, but did see it in the water proceeding from the *Panama*.

Q. How did you see this?

A. I was watching both vessels with my glass.

The word "*Panama*" used here seems to be a slip of the tongue for "*Mangrove*," as he says later (add. 21, q. 163):

Q. Could you see whether it was going or coming when you saw it?

A. It appeared to me to be going toward the *Panama*.

He gives details as to the boat (add. 21–22, qq. 160-177; pp. 37–38, qq. 325–328):

As to the gun fire, he says (add. 5):

> Q. How do you know that the *Mangrove* fired the three shots to which you have testified?
>
> A. I heard the shots fired and saw the smoke from the guns.
>
> Q. Please describe what you saw when you say you saw the smoke from the guns.
>
> A. I saw the puff of smoke shoot out from the ship. I don't remember which bow it was from; from either the starboard or port bow; she was turned toward the steamer; probably it was the port bow.
>
> Q. Did you hear the guns?
>
> A. I heard them. I heard all three.

He explains this on cross-examination by saying (add. 11):

> Q. Were you looking at this smoke at the time that you heard the gun fired?
>
> A. At the time that I heard the gun fired? Possibly not, because I would see the smoke some time before I heard the gun. I may have looked away.
>
> Q. Would not the sight of the smoke coming from the gun make you naturally listen with more alertness to hear the report of the gun than you would ordinarily be listening if you had not seen the smoke?
>
> A. No, sir; I think not, because, having seen the smoke, I knew that the report would follow, and had no further particular interest in the sound, as I was probably then watching the merchant ship to see what the effect would be.

Q. How loud did this report sound to you at the distance that you were?

A. I don't remember.

And adds (add., 38):

334. Q. You know you did hear the report after you saw the flash, don't you?

A. I do not at this time remember hearing the report; that is, haven't a distinct impression on my mind of that sound. It is very probable that I did hear it.

335. Q. Didn't you state, Captain, in the direct examination that you heard the report, and that it was loud enough to have attracted the attention of other people on the ship who might have been watching and have seen the puff of smoke as you saw it?

A. I believe that I did.

336. Q. And now you say that you haven't a distinct recollection of the report?

A. I haven't such a recollection of it, nor had I when I testified in the direct examination, that I could give any correct estimate of the length of time after the sight of the smoke from the guns.

Being signal officer, he is particularly qualified to speak as to signals. He says (add., 19):

148 Q. What I want to get at is this: Have you had any particularly different instruction in signaling from that which other officers of the line of the Marine Corps and of the Navy of your rank and age would ordinarily have in their line of duty?

A. Not more than a great many others ordinarily afloat; more than some others, because I was signal officer of the ship for a period of perhaps a year and a half, and, therefore, had more practical daily experience in fact than a number of officers of my rank who were not so situated.

149 Q. Have you ever been an instructor in signaling in the Navy?

A. Yes; to the extent that all officers placed in charge of signals are required to teach their subordinates the practice of their duty.

His mind was particularly addressed to reading signals from the *Mangrove* at that time (add., 38):

330 Q. Well, then, were you not watching pretty closely in scanning these vessels to see whether anything did pass between them or not?

A. I was watching the whole occurrence, and naturally would have included that as part of it. I was also watching, however, as signal officer, for the appearance of signals, and observing the Spanish vessel with a view to more closely identifying her.

He testifies (add., 7):

26. Q. Please state whether at the time of the lowering of the boat from the *Mangrove* to go to the *Panama* you could have read flag signals from the *Mangrove*.

A. At the time of the lowering of the boat?

27. Q. Yes.

A. I could.

29. Q. State the reason for that answer.

A. Why, the flags are hoisted high above the ship, usually with the sky for a background, and they stand out to the observer much more distinctly, at least as to the outline, than a small boat on the water several miles distant. The boat and the water at that distance appear to be very similar in color, and the boat was in fact like a speck floating on the water, when a signal given to (*by?*) a ship immediately alongside could usually be read by a powerful glass for the reason above stated.

* * * * *

32. Q. You have referred to seeing smoke from the guns of the *Mangrove* when she fired. Will you please state whether a flag signal would or would not have been legible at as great a distance as what you saw of the smoke?

A. I think it would, and perhaps further, as the smoke I refer to was seen shortly after it left the muzzle of the gun, and was not the haze which rises from the discharge of a gun.

And later (add., 12):

87. Q. Are you quite sure that you could make out a flag signal at whatever distance you could see the smoke from the muzzle of a gun?

A. I am quite positive that I could read a flag signal, the conditions being reasonably favorable, at least as far as I could detect the smoke issuing from the muzzle of a 6-pounder gun at the instant of discharge, probably further.

His opinion is twice expressed most positively as to reading signals (add., 31, 39):

279. Q. Now, with all those conditions which are essential to reading understandingly a flag

signal at a distance, can you say beyond all possibility of doubt that you could have read a flag signal from the *Mangrove* at the time of the capture?

A. I am positive that from my recollection of all the circumstances named in the question, from the appearance of the *Mangrove* herself on the water, the appearance of the intervening space of water between us, and the general conditions at that time existing, that I could have read without difficulty any flag signal hoisted by the *Mangrove*. (Add., 31.)

* * * * *

339. Q. Captain, you state that you can't tell distinctly the directions that these different vessels were sailing, the *Mangrove* and the *Panama*, with relation to your own vessel, and can't state distinctly about hearing the report of the gun, or whether the boat was going or coming, or how long this stop was. If your recollection is so indifferent as to these points, how is it that you can recollect with such positive accuracy that you must have been close enough to read signals?

A. Because I have a sufficiently clear recollection of the appearance of the *Mangrove*—that is, her relative size and appearance at the time of the capture—to be sure from my experience with her and with vessels that were about her size that she was within a distance at which I could have read signals. Furthermore, I remember with equal distinctness that I had this certainty at that time, and that, as I have said before, I so expressed myself, and that there

was no difference of opinion on that point among the officers on deck in conversation about the matter at that time. (Add., 39.)

The testimony of these witnesses has been quoted so fully because they were the officers specially responsible at this time, one for the conduct of the vessel, if a signal were reported, and the other for the prompt and correct reading of signals, if made.

OTHER WITNESSES.

Other officers and men are no less positive both as to seeing the boat in the water or seeing or hearing the gun and as to the possibility of reading signals, had the *Mangrove* made them.

The following saw the boat in the water:

Gunner Mallery, from the deck, with glass or naked eye (add., 77, qq. 9, 12, 18, 19).

Chief Boatswain's Mate Carlos, from the deck, with naked eye (add., 210, qq. 9, 10).

Quartermaster Golden, from the masthead, with a glass (add., 247, qq. 10, 11).

Machinist Lee, from the deck, with naked eye (add., 240, qq. 10, 11).

Machinist Burns, from the deck, with naked eye (add., 258, 259).

Yeoman Kimball, from the deck, with naked eye (add., 252, 254).

Captain of the Hold Perkins, from the deck, with glass (add., 84, qq. 8–12; p. 85, qq. 9–13).

Water Tender Geary, from the deck, with glass (add., 240, qq. 9, 10; p. 242, q. 4).

Seaman Meehan, from the deck, with naked eye (add., 264).

Seaman Maybaum, from the deck, with naked eye (add., 255, 257).

Bugler Abbott, from the deck, with naked eye (add., 222, qq. 9, 10; 223, q. 4).

Apprentice Lindsay, from the bridge, with naked eye (add., 228, qq., 9, 10; 229, q. 4).

Private Blackiston, from the deck, with glass (add., 216, qq. 9, 10; 217, q. 4).

The boat was a ship's dingy, about 15 feet long (add., 151, q. 7), and on the trip to the *Panama* contained Lieutenant Dayton and two men (add., 137, q. 7). The ordinary complement of this boat would be eight to ten men, and some of the *Indiana's* witnesses (Carlos, add., 210, qq. 9, 10), seeing men in the boat, assumed this as the actual number; others observed and state a less number (Geary, four or five, add., 240, qq. 9, 10; 242, q. 4; Maybaum, five, add., 255, 257); and Lee, with naked eye (add., 240, qq. 10, 11), gives the exact number correctly. That some state the complement shows that their vision was clear enough to fix the size of the boat, but not to discriminate the occupants; that others give a reduced number, even with the naked eye, shows their accurate vision, since the presumption from the size of the boat would be of a larger crew.

The witnesses as to the gunfire are as follows:

Captain Waller saw the smoke (add., 266, qq. 3, 5).

Gunner Mallery saw the smoke of the gun and flash (add., 77, q. 12). He saw the ordinary puff of

smoke which gushes from the muzzle of the gun when the gun is fired and the flash which also follows (add., 78, q. 13). His impression is that he did not use a glass, although he is not positive.

Chief Boatswain's Mate Carlos did not hear the gun fire, but he saw them either working or securing a gun on the starboard side of the *Mangrove* (add., 209, qq. 6, 7).

Gunner's Mate Coffee heard one gun fired from the *Mangrove* across the bow of the *Panama* (add., 234, q. 7).

Quartermaster Golden saw the flash and smoke of two shots fired from the *Mangrove* (add., 246, q. 6; 248, q. 3).

Machinist Lee saw and heard three guns fired from the *Mangrove;* saw the flash of the guns and the smoke (add., 239, q. 6; 240 q. 7).

Quartermaster Burns saw the flash of the guns from the *Mangrove* (add., 258).

Yeoman Kimball heard the report and saw a gun fired; is not sure how many—one, he thinks (add., 252); thinks it was one of the starboard forward guns.

Water Tender Geary saw three guns fired from the *Mangrove* from her port side (add., 240, q. 6).

Seaman Maybaum had his attention called to the *Mangrove* by shots fired from her; he saw a puff of smoke and a flash (add., 255).

Bugler Abbott saw the smoke of one gun (add., 222, qq. 7, 8; 223, q. 3).

Apprentice Lindsay saw the smoke and heard the

gun fire; is certain of two shots (add., 228, qq. 6, 7; 229, q. 3).

Private Blackiston heard reports of a gun; his attention was called to the *Mangrove* by the firing of a gun (add., 216, q. 6; 217, q. 3).

Pilot Munson saw the *Mangrove* fire a shot and came down and told Captain Taylor, and thinks that the captain said that he could see the smoke also (add., 191, q. 13).

WHAT THE WITNESSES SAW.

The reading of this testimony makes the impression absolute upon the mind that the distance between these two vessels was such that gun shots could be and were heard, and that the puff of smoke and flash from the gun, issuing at the moment of the firing, could be and were seen. This the witnesses differentiate from seeing the cloud of smoke that arises in the air after the shot.

There are many differences in the observations of the witnesses. Some heard the shots but did not see the flash; others saw the flash but did not hear the shots. Captain Taylor explains that if one were looking at the *Mangrove* and saw the shots, his mind would not be impressed with the sound later. If on the other side of the *Indiana*, he would not see the shots but would hear them. Some of the witnesses state that the guns were upon the starboard, and some upon the port side. Both port and starboard guns were in fact, fired (Everett, add., 105, q. 4). Some of the witnesses noticed the form of the guns; some remembered all three shots; some but two, and some no more

than one. Even the captain of the *Panama* recalled but two (Rec., 14, q. 3). These differences of recollection, in view of the distance of time at which the depositions were taken (three to four years), do not detract from the good faith of the witnesses or render less certain the facts that gun shots were heard and the jet of smoke and flash were seen from the *Indiana*.

There can be no question that just before the capture, 6.07, from the *Indiana* could be seen the boat in the water and the horizontal shooting out of smoke from the gun and the jet of flame.

SIGNAL DISTANCE ESTABLISHED.

Based upon the observations which they made of the distinctness of the *Mangrove* and the *Panama*, of the boat in the water between the vessels, of the gun fire, and the general atmospheric conditions, the witnesses all state the opinion that flag signals hoisted on the *Mangrove* at the time of the passing of the *Mangrove's* boat to the *Panama* could have been read on the *Indiana*.

Captain Waller, U. S. Marine Corps, has been reading signals for twenty-three years. In his opinion the *Mangrove* was in signal distance the whole time, even before a gun was fired (add., 267, qq. 12, 13).

Lieutenant Decker says that at the time of the capture signals by shapes or sounds could be distinguished; that when the *Panama* headed toward the *Indiana* the colors of her ensign could be distinguished; that the *Mangrove* was within easy signal distance when the prize was first sighted, and that visual signals or sounds could be easily discerned (rec., 40, qq. 4–7).

Gunner Mallery was chief signalman of the squadron of evolution for about three years; thinks that flag signals could have been used at this time (add., 79, q. 27). They could have used gun signals (add., 79, q. 27; add., 81, qq. 21–23). He says that he had read signals with a glass when he could just see the mast of a vessel with the naked eye (add., 81, q. 27).

Chief Boatswain's Mate Carlos was acquainted with signal flags by observing others use them (add., 210, q. 11), and by instructions or drills (add., 211, q. 6). Using only the naked eye, he says that in his opinion, signal flags on the *Mangrove* could have been read from the *Indiana* "because I could see the men on the *Mangrove's* deck" (add., 210, q. 12).

Quartermaster Golden has had much experience with signals, because quartermaster. At the time of the capture he could read easily and make out easily the colors of signal flags through the long glass or by binoculars, because he could make out the colors of the *Panama* (add., 247, q. 12).

He was quartermaster in two cruises from 1893 to 1898; served on a flag-ship where he read all the signals himself and read signals about 8 miles with a glass (add., 248, q. 6).

Machinist Burns had been a signal boy for nine months before this occurrence, and says that signals hoisted on the *Mangrove* could have been read from the *Indiana* with the ordinary binoculars; he knows it as a positive fact as a signal man (add., 259).

He describes the duties of a signal boy (add., 260, 261), and says that he is certain that he could read a

signal farther than he can see a boat 15 or 18 feet long in the water, because of the colors of the signals and of the elevation of the signals (add., 261).

Yeoman Kimball, who was acquainted with signal flags in the Navy and could read numbers with the flags, says that undoubtedly signals could have been read (add., 252, 253).

Captain of the Hold Charles Perkins could read signals and knows their numbers but not their meaning (add., 86, qq. 28, 29), and at the time of capture says that signal flags could have been distinguished with glasses, but not with the naked eye (add., 84, q. 20).

Seaman Maybaum had received instruction in signals and could read flag signals. He had been three years in the Navy and could, with the aid of a glass and a book, have read flag signals hoisted on the *Mangrove* from the *Indiana* at this time. He says (add., 255):

> Q. Why do you say that you could have read signals at that time?
>
> A. I feel positive—why, well, seeing a boat pulling across the water, you can read signals, from previous experiences of distance while I was in the Navy.

Apprentice Lindsay had had five months' experience in making signals and using flags, and at the time of capture says that signals could have been read with a glass from the *Indiana* if hoisted on the *Mangrove* (add., 228, qq. 11, 12).

Private Blackiston had experience in reading and making signals with flags and thinks that flag signals

could have been read at the time stated (add., 216, 217, qq. 11, 12).

Pilot Munson, called for the *Mangrove*, says on direct examination that he does not think that signals could have been read at the time (add., 192, q. 19). He has had no naval experience in reading signals and his only experience in the merchant service was not in late years. The force of his testimony on this point is wholly destroyed by his own letter (add., 196) produced at this time and identified by him, dated January 13, 1901, in which he states: "The *Indiana* was in signal distance and no other."

We have not referred to the depositions of Gunner's Mate Coffee, Machinist Lee, Water Tender Geary, Seaman Meehan, and Bugler Abbott, because these witnesses all state that they have not had experience in reading signals, although they say that signals could have been read.

The depositions of eight enlisted men in the Navy were taken on interrogatories under stipulation of counsel (add., 205, 249). Seven of these witnesses were asked by the counsel for the *Mangrove* the following question:

> Cross-interrogatory 7. Did you see the signal made by the *Mangrove* when she captured the *Panama?*

This may be called a "catch question," likely to trip a witness of average intelligence, since it is not contended that any such signal was made. A similar question was asked of one witness on oral examination (add., 265).

All the witnesses who have knowledge of signals deny seeing any signal except Apprentice Lindsay, who says (add., 230, q. 7) that he saw the flags, but did not read the signals, an answer not inconsistent with his meaning that he saw flags (the ensigns were flying), but no signals. Lee (add., 242, q. 7), Geary (add., 242, q. 7), and Meehan (add., 263, 265), none of whom has had experience in reading signals, say that they saw signals. Their opinions as to signal distance are not relied on. Thus none of the witnesses having expert knowledge of signals fell into this trap.

The depositions of the eight witnesses on interrogatories (add., 205–250) were taken at widely scattered points over the world, on naval vessels, before disinterested naval officers, under circumstances most indicative of good faith.

It is respectfully submitted that the evidence thus shown is convincing upon the two material points:

(1) That visual signals, if hoisted on the *Mangrove*, could have been read from the *Indiana*.

(2) That gun signals, if made on the *Mangrove*, could have been understood on the *Indiana*.

The witnesses called occupied every position on the ship from captain to apprentice boy. They had performed different duties in regard to signals, and were competent to express an opinion on the question of reading signals. The positive impression on the minds of all was that, with the favorable atmospheric conditions then existing, signals could have been read without difficulty from the *Indiana* if hoisted on the *Man-*

grove. Such an universal opinion is convincing of the fact.

Upon this evidence, of which very little was before the court below, there can be no difficulty in reaching the conclusion that the *Indiana* was in signal distance of the *Mangrove* at the time of this capture by the use either of the ordinary visual day signals or of gun signals.

GUN SIGNALING AUTHORIZED AND PRACTICABLE.

A strong effort was made in the cross-examination of various witnesses to show that gun signaling is an unrecognized and impracticable mode of signaling. Captain Taylor says that provisions for gun signals are carefully laid down (add., 73, already quoted). The official signal book is confidential (add., 37, q. 317). Lieutenant Dayton, of the *Mangrove*, furnishes an extract from it which puts the question as to the use of gun signals beyond controversy (add., 142, qq. 56, 57):

> Q. 56. Where are the rules laid down for signaling in the Navy?
>
> A. In the Instructions for Signaling, United States Navy, 1898.
>
> Q. 57. What are the circumstances provided there in which sound signals may be used in the daytime?
>
> A. On page 33 of the Instructions for Signaling, United States Navy, 1898, under the head of "Sound signals," it says: "At night, or in a fog, mist, or falling snow by day or night, sound signals may be made with gun, bell, fog horn, or steam whistle.

"Gun: In cases of extreme urgency guns may be fired, using the General Signal Book. The numbers will be made as in the numerals of the Naval Code, one gun being a '1,' two guns in rapid succession a '2,' and three guns in rapid succession a '3:' the affirmative or 'yes,' 1212; the negative or 'no,' 2121; the numeral, 2122; the interrogatory, 1211." That is in the Signal Book in reference to signaling guns.

This proof offered by the *Mangrove* was admitted with the assent of the other parties.

What this Signal Book is was explained by Lieutenant Dawson (add., 37, qq. 316, 317, 318):

316. Q. What is this General Signal Book to which you refer?

A. It is the book issued by the Navy Department to all ships in commission, containing a large number of previously constructed messages, each being indicated by its own number, so that when that number is made by visual or sound signals, on referring to the same number in the General Signal Book the message is understood, and vice versa, as regards sending this message.

(Mr. Micou objects to this question on the ground that there is better evidence of what the Signal Book says, namely, the book itself.)

317. Q. Can you state whether this book is of a confidential character?

A. It is.

318. Q. To whom is it furnished?

A. To the commanding officer of each vessel, as I remember.

His further testimony in regard to gun signaling appears (add., 16, 17, and 18). He declares its practicability as follows (add., 17):

131. Now, Captain, my question is not whether you could devise a system by which you could do this thing with guns. My question is, could you, with the experience that you have had in the Navy, with the practical working of this to-day, if you were called upon to-morrow, send a signal with guns that would be understood by any other signal officer? I don't mean by that that he would understand it as a signal, but that he would be able to intelligently read and interpret your signal?

A. I believe that I could, if the other signal officer had been accustomed to the use of any sound signals.

132. Q. Do you believe that you could have interpreted on board the *Indiana* a signal made by guns fired from the *Mangrove* asking you in what direction the flagship was?

A. If the signal had been made as described in the tactical signal book I believe that I could.

133. Q. Does the tactical signal book prescribe signals of this kind to be made with guns, or just without mentioning the instrument that you make them with?

A. It mentions specially three methods of making sound signals. They are the use of guns, with whistles, and with the bell. These three are prescribed in the official book, and are required to be taught on board naval vessels.

134. Q. Now, you say that you believe that

you could have read such a signal as I have mentioned just now from the *Mangrove?*

A. If it had been properly made; yes, sir.

135. Q. Are you satisfied beyond all doubt that you could have read such a signal?

A. I can only say that I was at the time thoroughly familiar with sound signals, and had such a signal been properly sent I am confident that I should have been able to understand it.

Captain Taylor's evidence has been lately quoted (add., 73).

Gunner Mallery (add., 81) discusses the same subject.

It is thus beyond doubt that signaling by gun fire is officially recognized as a mode of signaling to be used when necessary, and is wholly practicable.

The courts can not discriminate between two modes of signaling equally recognized and practicable.

Part III.

OBSERVATIONS FROM THE MANGROVE AND PANAMA.

The testimony from the opposite end of the scene, the *Mangrove* and *Panama*, is divided into three classes:

(1) The testimony from the *Mangrove* of the officers and men of the *Mangrove*.

(2) The testimony from the *Mangrove* of an officer and a petty officer of the *Indiana*.

(3) The testimony from the *Panama*.

These will be considered in this order.

THE MANGROVE'S EVIDENCE.

The officers of the *Mangrove* were Lieut.-Commander William H. Everett, commanding, Ensign John H. Dayton, and Cadet Leigh C. Palmer. She had about thirty men (add., 143, q. 73).

Commander Everett in preparatorio testifies positively (rec., 31, q. 4), "There was no vessel or vessels of any description within sight at the time I made this capture," and repeats it (rec., 32, q. 10); "I repeat at the time of the capture of the *Panama* by the *Mangrove* there were no vessels of the Navy in sight or within signal distance." His testimony was afterwards given in full detail upon examination and cross-examination. He says (add., 108, q. 10) that had a vessel been in signal distance he could have seen it with the naked eye, and that all he saw was smoke to the southward and westward "in the direction of where we had left the *Indiana*."

This witness' testimony as to matters of eyesight is considerably weakened by the fact that (add., 117, q. 118) he had used glasses since 1890, and that on the 6th of June, 1898, he had such trouble with his eyes (add., 108, q. 19) that he had them examined by an eye specialist. There is other evidence also that he stated that his eyesight was defective and that his eyesight was observed to be defective (add., 45).

Ensign Dayton, the boarding officer, in his deposition in preparatorio, said: "There was no vessels within signal distance at the time of capture" (rec., 29, q. 4), and in answer to the tenth question (for question see

rec., 22, top of page), asking for other facts in regard to signal distance, he says: "I have no more facts to state." He testified also upon oral examination that upon arrival on the *Panama*, not seeing the *Indiana*, he asked the *Mangrove* for the *Indiana's* bearings, and, heading the *Panama* as directed, saw the smoke of the *Indiana* and in five or ten minutes her fighting top (add., 138, qq. 16 and 19; 145, qq. 10 and 19). He says that he did not look around for the *Indiana* after he saw her at the beginning of the chase.

Naval Cadet L. C. Palmer testified in preparatorio that at the time of the capture he saw the smoke of a vessel which he took to be the *Indiana*, and ordered the first and second mates and apothecary to look whether there were other vessels in sight; that they reported no other vessel than the *Panama;* that he looked with glasses and could see no other ship, but could see smoke which he took to be the smoke of the *Indiana* (rec., 33, q. 4), and concludes his deposition by saying "There were no vessels of the United States Navy within signal distance at the time the *Mangrove* captured the *Panama*." On oral examination he testifies (add., 124, qq. 9, 11), that the smoke came from one place. He says (add., 133, q. 37) "I saw smoke rising as one might see it from a bonfire, or ship at sea."

Other witnesses, enlisted men on this vessel, testify as do these officers. The depositions of eight of these were taken in preparatorio (rec., 22 to 34), and of these, four were reexamined before counsel. Five more enlisted men in addition were examined under the order of

this court. All but three (Ellmore, add., 168, qq. 25, 26; Jones, add., 181; Roy, add., 187) testify in general to the fact as stated by one of the officers, that they saw no ship in sight, or that they saw the smoke of what they believed to be the *Indiana*. Some of these witnesses (see Hansen, add., 165, qq. 12–15) say that Ensign Dayton or Cadet Palmer told them to look around for other vessels.

THE *INDIANA'S* EVIDENCE ON THE *MANGROVE*.

When the *Mangrove* set forth by direction of the *Indiana* for Key West, she took as passengers Chaplain William G. Cassard and Chief Yeoman Charles E. Murray of the *Indiana* (add., 105, q. 4). They were going to Key West for the officers' and enlisted men's messes of the *Indiana* to purchase provisions. Their testimony was taken in preparatorio and again on oral examination under the order of this court.

The chaplain answered the inquiry as to what vessels of the Navy were within signal distance by saying (rec., 39, q. 4):

> The *Indiana* only. She was within 3 or 4 miles of us. The prize was between the *Mangrove* and the *Indiana*, the *Mangrove* having passed the prize and turned again toward her. Any of the ordinary visual signals should have been discerned by the use of glasses.

In his subsequent oral examination he makes the same statements no less clearly, but more fully, testifying as follows (add., 44):

> Q. At this time, when the mate reported this

fact to Captain Everett, did you yourself observe whether the *Indiana* was in sight?

A. I did; and saw her.

Q. When the vessel stopped and the boat was sent from the *Mangrove* to the *Panama*, did you then notice whether the *Indiana* was in sight?

A. She was in sight. There never was a time from the time that the chase began when the *Indiana* was not in sight. There might have been times when we were so close under the side of the *Panama* that we couldn't have seen her just for a moment.

Q. Please state whether or not the time when the vessel stopped and the boat was sent from the *Mangrove* to the *Panama* the *Indiana* was within signal distance.

A. She was.

Q. Will you please explain what you mean by "signal distance?"

A. I mean the distance at which flags could be read from the bridge of the *Mangrove*. I did not have any glasses during the entire chase. I used only my naked eye.

Q. Please let us know as correctly as you can what appearance the *Indiana* presented at the time, and what you could see about her.

A. I could clearly make out the entire ship, including her whole hull—certainly a part of her hull—from the very beginning, so clearly and unmistakably the *Indiana* that the question of what ship it was never came up at all.

Q. What facts are there that lead you to the conclusion that the signal flags could be read from the *Mangrove* on the *Indiana* at that time?

A. My observation of the distances at which we have read signal flags in fleet or in communicating with single vessels.

Chief Yeoman Murray answers the fourth interrogatory in preparatorio as to what vessels were within signal distance, as follows (rec., 43, qq. 4–7):

The *Indiana* only. I mean by "within signal distance" that the ordinary day signals used in the navy hoists of flags or wig-wag could be read by use of glass from the bridge of the *Mangrove*. A wig-wag from the *Indiana's* crane could have been read by the use of a glass.

* * * * *

The *Indiana* was within signal distance at all times during the chase—from the time the prize was first sighted until captured. I mean by "signal distance" as explained in preceding answers.

This witness had been in the Navy over four years at this time (add., 88, q. 2), and upon oral examination says (add., 91, q. 15):

15. Q. At that particular time, when Ensign Dayton went on board the *Panama*, can you state whether the *Indiana* was within signalling?

A. She was within signalling distance—could have signalled one another without any trouble.

These two witnesses are interested in the prize as members of the complement of the *Indiana* (R. S., § 4633); but the last witness, Murray, doing duty on board the *Mangrove* at the time (he loaded the star-

board gun, add., 89, q. 10), would draw a larger amount of prize money under section 4631 of the Revised Statutes as a temporary member of the crew of the *Mangrove* than he would if the *Indiana* shares. This is the view of the Court of Claims (*The Santiago Bounty*, 36 C. Cls. R., 203) where they say:

> (9) The officers, naval cadets, enlisted men, private marines, and members of the crew are entitled to share in the bounty awarded to the vessel on which they were serving, in obedience to orders, during the engagement, though their pay account may have been kept on other vessels or at the Naval Academy.

He is therefore to be regarded as a witness testifying against his own interests, when testifying in favor of the *Indiana's* right to share.

THE EVIDENCE FROM THE *PANAMA*.

But there is another source of information, the *Panama*. The officers of the *Panama* were examined in preparatorio, and interrogatories were propounded to them as to the vessels in sight at the time of the capture. Manuel Quevedo, captain of the *Panama*, testifies (rec., 14, q. 3):

> * * * Two shots were fired by the *Mangrove*. My ship was captured by the *Mangrove*. The ship that captured my vessel I believe to be a war ship. There were two ships in sight at the time we were captured. Afterwards I was informed that one was the *Indiana* and one was the *Wilmington*. I first saw the *Mangrove*—that was at 5.30 p. m., and shortly afterwards I saw the towers of the other ship.

Ramon Burgas, supercargo of the *Panama*, testifies (rec., 7, q. 3):

> * * * There was no resistance. We were captured by the U. S. S. *Mangrove;* she was a ship of war. At the time of the capture there were two war ships is distance (*sic*). I could not see the body of the ships, but could see their towers. Afterwards we steamed up to the war ships with the *Mangrove* and found that the ships were the *Indiana* and the *Wilmington.*

Gaspar Thompson, chief engineer of the *Panama*, was not able to testify fully, as his duties required him below, but Dayton says that he was on deck at the very time when Dayton boarded the *Panama* (add., 137, end of q. 7). He says (rec., 10, q. 3):

> * * * We made no resistance at the time. We were captured by the U. S. S. *Mangrove.* The ship that captured us was a ship of war. I believe the U. S. S. *Indiana* and another ship were in sight. I was chief engineer of the *Panama* and my duties demanded my presence below, so I am not prepared to state positively as to time we sighted the other ships.

The time when they saw the "towers" of the *Indiana* is fixed by these witnesses. Quevedo says shortly after 5.30. He says that the *Indiana* was in sight "at the time we were captured." By this he means the time of his stopping for surrender, which he thus states (rec., 13, q. 3): "At 5.50 the first shot was fired by the *Mangrove.* After the first shot I stopped the ship."

Burgas says that "at the time of capture" he could see the *Indiana's* towers. He does not fix this time,

but Thompson confirms Quevedo's view of what constituted the capture by saying (rec., 10, q. 3): "The ship was taken about 20 miles from Habana, Cuba, at about 15 minutes to 6 o'clock p. m., on the 25th day of April, A. D. 1898." The *Panama's* officers plainly mean to say that they saw the *Indiana's* "towers" at about 5.45 to 5.50.

They undoubtedly swept the horizon before surrendering. The *Mangrove* observed that they began to remove the gun covers, evidence of a purpose to make a contest. Something caused them to give up this intention, since they quickly replaced them (add., 158, q. 14; add., 171, q. 7). It may well be that the sight of the *Indiana* determined the surrender.

A CONFLICT OF EVIDENCE.

We thus have an absolute conflict in testimony on this subject. The officers and men of the *Mangrove* say that no vessel was in sight when the capture was effected, some saying that they saw smoke (Clinton, rec., 27; Dayton, rec., 29; Everett, rec., 31, 32; Cosgrove, rec., 34, 35), and others failing to mention even smoke.

The officer and petty officer from the *Indiana* on the *Mangrove* at the time say that they saw the *Indiana* distinctly and within signal distance at the time of capture.

The officers of the *Panama* say that they saw the *Indiana* at the time of capture. Dayton, who went on the *Panama*, says that he did not see the *Indiana* until the *Panama* had proceeded some distance after the cap-

ture (add., 138, qq. 16–20; 145, qq. 11–13, hereafter quoted).

The record left by this testimony is unsatisfactory.

CONCLUSIONS OF FACT.

Some conclusions may be reached.

THE *INDIANA'S* EVIDENCE NOT CONTRADICTED.

(1) The evidence adverse to the *Indiana* has a direct bearing only on the question whether signals hoisted on the *Indiana* could have been read from the *Mangrove*. We maintain, and shall show in discussing the law hereafter, that this is immaterial, the vital question being of signals on the *Mangrove* being read from the *Indiana*.

GUN SIGNALS NOT AFFECTED.

(2) No effort is made to show that gun signals between the *Indiana* and *Mangrove* could not have been understood on either vessel.

THE *INDIANA'S* EVIDENCE NOT IMPEACHED.

(3) The bearing, if any, of all this testimony is extremely indirect on the issue whether the *Indiana* could read signals hoisted on the *Mangrove*. The argument will doubtless be made for the *Mangrove* that if this testimony be correct, no such objects could have been seen from the *Indiana* as testified to by the witnesses.

This argument is without force because conditions were evidently more favorable for reading from the *Indiana* signals hoisted on the *Mangrove* than from the *Mangrove* signals hoisted on the *Indiana*.

Thus Munson testifies (add., 193, q. 46) "The northward atmosphere was very clear; to the southward it was hazy," and (add., 194, q. 54) "I think I could have seen the *Panama* and the *Mangrove* plainer than they could have seen the *Indiana*."

Lieutenant Dayton (add., 146, qq. 28, 29) says that the sun was shining down from the direction of the *Indiana* toward the *Mangrove* and the *Panama*, so that he could not see distinctly, and the reflection would be from these vessels toward the *Indiana*.

Yeoman Murray (add., 91, q. 18) says that the *Mangrove's* signals could have been more readily read than the *Indiana's*, and Captain Taylor makes a statement of the general conditions (add., 64) as follows:

> Q. What are the most favorable circumstances for reading signals?
>
> A. With the sun behind the observer and tolerably low down, with clear conditions of atmosphere. The light as I describe it, clear conditions of atmosphere, and not too much wind.

Cadet Palmer is too sturdy a partisan to admit even this, but says (add., 136, q. 1):

> Recross-q. 1. There is no doubt in your mind that if the *Indiana* could see the *Mangrove*, the *Mangrove* could see the *Indiana* at the same distance?
>
> A. Not the slightest.

For this reason the testimony of the *Mangrove's* witnesses as to conditions there, even if believed, does not

affect the probative force of the testimony of the *Indiana's* concurring witnesses as to conditions observed from the *Indiana* and their conclusion as to signal distance based upon their individual observations.

THE *MANGROVE'S* EVIDENCE ALL INTERESTED.

(4) On the question whether the *Mangrove* could have read signals hoisted on the *Indiana*, the *Mangrove's* testimony consists solely of testimony of the officers and men of the *Mangrove*. It is all interested and the interest is very large. The individual interests of the *Indiana* at most are very small. So far, therefore, as interest may affect testimony, the *Mangrove's* evidence is very much more largely interested than that of the *Indiana*.

The testimony for the *Indiana* as to what was seen from the *Mangrove* and *Panama* consists of depositions of five witnesses, of whom only one is interested, Chaplain Cassard. He would share with the *Indiana*, but would not share with the *Mangrove* alone. Murray, on the other hand, would share more largely on the *Mangrove*. The three witnesses on the *Panama* have no interest whatever. In balancing the testimony of the witnesses it may very well be said that great weight should be given to the evidence of Murray and of the disinterested witnesses on the *Panama*.

It can not be said that the *Mangrove's* evidence on this point can be reconciled with that of the officers of the *Panama* on the ground that the superior height of the *Panama* enabled them to see the *Indiana* when the *Mangrove* could not. Ensign Dayton, we have already

seen, says that he did not see the *Indiana* from the *Panama* until about ten to twenty minutes after he went on the *Panama* (add., 138, qq. 16–20; 145, qq. 11–13). He disagrees entirely with the officers of the *Panama*. The *Mangrove's* witnesses who saw the *Indiana* when or before her shot was fired, fix the time of first seeing her at an hour consistent with Dayton's testimony but quite inconsistent with the officers of the *Panama*, even allowing for the difference in height of the two vessels. Thus Palmer did not see the *Indiana's* fighting top until twenty minutes after they started (add., 134, qq. 53, 54), and Overn about one-half hour after the capture (add., 156, q. 4, 5). If the *Indiana* could not have been seen from the *Mangrove* until the time thus stated by these witnesses, she could not have been seen from the *Panama* at the time of capture, fixed by her officers as they testify.

The testimony from the *Indiana* makes it clear that the failure of the officers and men of the *Mangrove* to see the *Indiana* was not due to the *Indiana* being outside the line of sight, since at the moment of capture the *Indiana* saw a boat in the water. If the line of vision of the *Indiana* extended as low down as to a boat in the water, there must have been a direct line of vision between the *Mangrove* and the *Indiana* at the same time.

It may be said that the disinterested testimony of the *Panama* is that the *Indiana* was only in sight and not in signal distance. It is true that the witnesses were not interrogated as to signal distance. It is

doubtful if they were qualified to testify as to naval signals. The importance of their evidence is that it contradicts the *Mangrove's* testimony. It shows that the *Mangrove's* witnesses could not be right in their view that the *Indiana* was not in sight at the time. Having thus contradicted their testimony as to the visibility of the *Indiana*, the testimony of Cassard and Murray that she was then within signal distance may be accepted as unimpeached by credible testimony.

THE *INDIANA'S* EVIDENCE AFFIRMATIVE.

(5) The *Indiana's* evidence is affirmative and the *Mangrove's* negative. This alone should be sufficient to determine in the *Indiana's* favor the question whether the *Mangrove* could have read signals hoisted on the *Indiana*. The witnesses on the *Panama* and two witnesses on the *Mangrove* testify that they saw the *Indiana*. The other witnesses on the *Mangrove* say that they did not see the *Indiana*. The affirmative testimony must outweigh the negative.

This court announced this rule in *Stitt* v. *Huidekopers* (17 Wall., 394):

> On this subject the court charged the jury "that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed."
>
> We are of the opinion that the charge was a sound exposition of a recognized rule of evi-

dence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here.

The failure to see may have resulted from many circumstances. The hurry and excitement of the chase account for much. Thus Commander Everett never saw the *Indiana* at all until after she fired the shot (add., 117, q. 114), although he knew that the *Mangrove* was seeking the *Indiana*, and it was his special duty to be on the lookout for her. Charles Peterson says that the shot from the *Indiana* was a surprise to everybody, and that they did not know where the shell was coming from (add., 159, q. 33). Mate Cosgrove, who was standing with Commander Everett, says that neither he nor the commander saw anything. He speaks of the *Indiana* as an unknown vessel (add., 171, q. 7). On the other hand, Palmer (add., 134, q. 53) and Dayton (add., 138, q. 16) saw the *Indiana* long before this. The confusion and excitement of the chase and other like circumstances may account for such differences in view as these.

If the witnesses on the *Mangrove* differ in what they saw, and some were so blind to what others saw, it is safe to conclude that all the *Mangrove's* witnesses may have failed to see the *Indiana* when she was seen by Cassard and Murray and the officers of the *Panama*.

We may safely rely on the principle that affirmative should outweigh negative evidence.

(6) The learned judge, deciding this case below on the meager record then in hand, says (rec., 57):

> To declare that the witnesses of either side have willfully testified falsely is not a satisfactory conclusion, especially when the character and official standing of many of them is considered, yet such conclusion must be reached unless some explanation of the discrepancy is found.

We have constantly refrained from contending as essential to our case that the officers and men of the *Mangrove* have been deliberately untruthful in their testimony. We do not assert or believe such a thing either of the officers in a service noted for honor or of the brave men who served their country with equal gallantry in humbler places. It is our view that the smoke of the guns, the excitement, the sailor's pride in his ship and in the honorable exploit, the unconscious effect of the desire for the sole honor of victory—more indeed than the wish for prize money—influenced the *Mangrove's* officers and men in not seeing what required concentrated vision to see. We credit their good faith, but think them greatly in error.

On the contrary, to accept the *Mangrove's* view is to accuse the *Indiana's* witnesses of wholesale untruth. If even the fighting top of the *Indiana* could not have been seen from the *Mangrove* until from ten to twenty minutes after the *Mangrove* started toward her, Chaplain Cassard and Yeoman Murray, testifying positively to an opposite affirmative fact, must have purposely tes-

tified untruthfully. The nineteen officers and men of the *Indiana* must also be testifying untruthfully with deliberation when they say that a clear line of vision extended from the deck and superstructure of the *Indiana* to the boat in the water at 6.07 and the gun on the lower deck of the *Mangrove*, if the distance was so great that the fighting top of the *Indiana* was not within the line of sight until 6.17 or even 6.27. They could not have seen what they say they saw had this been true.

We believe that the right aspect of this case is the one more nearly consistent with reasonably good faith on both sides. There can be no question that this is the aspect of the *Indiana*. That may be held if the *Indiana's* theory is supported; it can not be held on the *Mangrove's* theory.

THE RESULT OF THE EVIDENCE.

From these considerations we submit:

I. That the testimony from the *Mangrove* does not affect the conclusion based on the testimony from the *Indiana*, that at the time of capture the *Indiana* could have read visual signals hoisted on the *Mangrove*.

II. That it has no bearing upon the conclusion that the *Indiana* could have understood gun signals made from the *Mangrove*.

III. That the *Indiana* was in sight from the *Mangrove* at the time of capture, and signals hoisted on the *Indiana* could have been read on the *Mangrove*.

PART IV.

EVIDENCE OF SPEED AND DISTANCE.

The *Mangrove* maintains that other evidence, not already cited, shows various facts relating to speed, distance, and signaling, from which is reached a conclusion unfavorable to the *Indiana*'s claim, and contradictory of her evidence. The *Indiana* contends that the factors relied upon are, in general, uncertain; that they lead to no positive conclusion, and that all such evidence analyzed and read together contains nothing inconsistent with the *Indiana's* claim or the evidence on which she relies.

THE QUESTIONS AT ISSUE.

It is conceded that the moment of capture was 6.07 and that the *Indiana* fired her gun at 6.45. Evidence is therefore introduced on the following points, designed to show how distant the two vessels were at 6.07:

(1) Were they approaching for this whole period? If not, for how long was either not moving?

(2) At what rate of speed were they moving?

(3) How far were they apart when the *Indiana* fired her gun at 6.45?

Accurate answers to these questions would fix their distance apart at 6.07, the moment of capture.

Evidence is also adduced to show the distance by a different mode of calculation based on the following facts:

(4) The time after the capture when Dayton first saw the *Indiana* from the *Panama*.

(5) The distance by standard tables at which an object of the known height of the *Indiana's* top could be seen from the known height of the *Panama's* bridge.

From this, with the proof of speed, is aimed to be deduced the distance at 6.07.

Having these two modes of proof of distance, evidence is next introduced as to:

(6) The extreme distance at which signals can be read.

No evidence has been introduced on behalf of the *Mangrove* as to the limit of signal distance by gun fire.

The *Indiana* disputes the conclusions reached upon the evidence on these points because the elements of uncertainty are too great. Thus the proof is indefinite and conflicting as to (1) the length of time of the *Mangrove's* approach, (2) the rate of speed of both vessels, (3) their distance when the *Indiana's* gun was fired, (4) the time elapsing until Dayton saw the *Indiana* and whether he saw her as soon as she was visible, and (6) the extreme of signal distance. Without accuracy on all these, the results are of little importance.

The result of the first mode of calculation, on the *Mangrove's* evidence, is to put the *Indiana* at a distance of 11 to 12 miles, of the second, of about 16.

We will first review the evidence on all these points separately and then discuss the result of the evidence.

THE TIME OF APPROACH OF THE VESSELS.

(1) Were the *Indiana* and *Mangrove* approaching during the whole time between 6.07 and 6.45?

It is conceded that the *Indiana* was approaching all

the time. The *Mangrove* had stopped to send her boat to the *Panama*. The uncertainty is as to the length of the stop after 6.07. The best evidence on this subject is that on the *Mangrove* itself.

Chaplain Cassard says that from the time the vessels stopped until they started again was about twenty minutes (add., 42).

Yeoman Murray says that it was fifteen to twenty minutes from Dayton's arrival on the *Panama* till the start (add., 90, q. 12).

Commander Everett fixes the time when the two ships were at a standstill at about fifteen minutes (add., 109, q. 29). He gives the details of this later (add., 116, 117, qq. 102–109), as follows:

	Minutes.
To get the boat out	1
To go over	5
To come back	5
To get the boat on board	2 to 3
A total of	13 to 14

Ensign Dayton says that it was not over ten minutes from the time he got on board until they started (add., 138, q. 16).

Chipchase fixes the total amount of time from Dayton's arrival on the *Panama* to the start at four or five minutes (add., 149, q. 20); Overn (add., 155, qq. 31–34) at rather less than five minutes; Charles Peterson (add., 158, qq. 21–23) at rather more than five minutes; Hansen (add., 162, q. 21) at less than five minutes, while Mate Cosgrove (add., 173, q. 13), and Oiler Roy (add., 189, q. 25) do not think that the entire stop of the two vessels exceeded five minutes altogether.

Engineer Ellmore testified, under objection by the *Indiana's* counsel, that the engine-room log (add., 166, q. 7) shows that the engine started at 6.16. The log has not been produced, nor is there any effort in the record to account for its nonproduction. That would be the best evidence of the time of starting. The failure to produce it may be taken as an admission on the part of the *Mangrove* that its production would exhibit a later minute of time than that to which the witnesses testify. This certainly warrants the acceptance of the testimony of Murray and Cassard and, conceding five minutes from the stop until Dayton reached the *Panama*, the allowance of fifteen minutes as the time elapsing from Dayton's arrival on the *Panama* until the vessel started, as against ten minutes alleged by the officers of the *Mangrove*. The allegations of a number of enlisted men are clearly underestimates and may be disregarded in view of the officers' statements.

THE RATES OF SPEED.

(2) What were the respective rates of speed of these vessels while moving?

Considerable diversity of opinion exists. The testimony in regard to the speed of the *Indiana* is as follows:

Captain Taylor, who was directly responsible for the speed of the *Indiana*, explains (add., 59, 60) the very foul condition of the bottom of the *Indiana* and the serious difficulties with the boilers of the vessel (add., 74). His deliberate judgment as to the speed of the *Indiana*, from the time of the capture of the *Panama*

until her gun was fired—6.07 to 6.45 p. m.—is in the neighborhood of 8 knots. He says (add., 60):

> We moved at varying speeds during that period of twenty-five minutes or half hour. We were not in haste when we first started toward the prize, no reason then appearing for haste. Later, when the gun was fired and a doubt appeared to us whether the *Mangrove* would certainly secure her, there was a quickening of the speed for a period of a few minutes—how many I do not know—which was reduced again to her regular slow speed as soon as we were within easy gunshot, or before that—as soon as we saw that she was within our reach and grasp. I should say that the average of these speeds for that half hour ranged from $8\frac{1}{4}$ to $7\frac{3}{4}$ knots. Between those two would be the average of what we made—would be about that, from $8\frac{1}{4}$ to $7\frac{3}{4}$; in other words, in the neighborhood of 8 knots, averaging.

Lieutenant Dawson says that shortly before the capture the *Indiana* was making full speed, between 10 and 11 knots (add., 4, q. 9), but he does not say that this was kept up during the whole time.

Chaplain Cassard, who watched the *Indiana* from the *Mangrove* and had made previous observations of her speed, says (add., 45) that he estimates her speed at $7\frac{1}{2}$ knots an hour.

Commander Everett, without any very satisfactory data, estimates the speed of the *Indiana* at 10 knots (add., 113, q. 67).

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Lieutenant Dayton (add., 143, q. 72), at 10 knots, judging from her appearance only, and Pilot Munson (add., 191, q. 16), a witness for the *Mangrove*, on the *Indiana*, an experienced mariner and disinterested, says:

> I think she was doing her best, and that would not be over 8 knots, somewhere in that neighborhood, 8½ probably; but I could not judge of her speed exactly; I know when she was going down to Porto Rico she lagged behind the fleet, but she was doing her best when she was in the chase.

There is an attempt to prove by purely theoretical expert testimony, that of Lieutenant Dyson, from the steam log of the *Indiana*, that she was going at the rate of from 10.45 to 10.96 knots at this time (add., 198, q. 7). It appears that when ordered to make the best speed possible, which was during a portion of this time, she made 88 turns of the starboard engine and 92 of the port engine, an average of 90. This entry does not show that she made this number of turns for the whole time from 6.07 to 6.45, but that this number of turns was the maximum made under the orders to make the best speed possible. At this rate of revolution, the speed last above stated is deduced, although Mr. Dyson does not have entire confidence in the results, as, after stating these two figures, he gives 10¾ knots as about the speed made.

Admiral Taylor's testimony admits this acceleration of speed and shows that it was kept up for but a brief part of the time. The rate can not be applied to the whole thirty-eight minutes.

The testimony of the witnesses on each side is not in entire accord. Dawson, testifying for the *Indiana*, mentions the higher speed as attained at one time during the run, and Munson, testifying for the *Mangrove*, gives the lower rate as the average. We think Munson, an experienced seafaring man, a valuable witness on this point. The contention of the *Mangrove* is that the speed was about 10½ knots, while the *Indiana's* contention is 8 knots.

We think that the preponderating evidence is Captain Taylor's, as supported by Pilot Munson, in fixing the average speed at about 8 knots.

As to the *Mangrove's* speed the evidence is all from the *Mangrove*, except Captain Taylor's statement that he believes the speed of the *Mangrove* less than 6 knots when she left to go to Key West in the afternoon (add., 59).

Commander Everett says that the *Mangrove's* best speed was about 8 knots (add., 112, q. 59), and that her ordinary speed would get down to 6 knots (add., 115, 116, qq. 94–98).

Ensign Dayton fixes the speed at 8 or 9 knots (add., 143, q. 70), and Cadet Palmer at a little more than 8 knots, not much more (add., 131, q. 20).

The enlisted men on the vessel, including the engineer's force, say in general that with the sails which were up until the *Panama* was captured they made about 9 knots, but without the sails about 8.

It is explained that this maximum speed was kept up all the time by doubling the engine-room force by vol-

unteers, and while some witnesses say that this was continued after the capture, Oiler Charles Peterson says that the help by the extra firemen was while going toward the *Panama* (add., 160, q. 15). It is highly improbable that the maximum rate of speed was continued by volunteer work during all the time up to the firing of the *Indiana's* gun. The need and consequent anxiety for rapid speed was gone after the vessel's capture. There was a natural relaxation. It is admitted that the *Mangrove* went faster when chasing the *Panama* than after the capture. It is to be supposed that the speed was reduced as the *Indiana* approached. On these points, see testimony of Chipchase (add., 150, qq. 36–42; 152, q. 13), Overn (add., 156, qq. 12, 13), and Charles Peterson (add., 158, 159, qq. 24–26; 160, qq. 9–15).

Due allowance being made for the exaggeration which is necessarily expected under such conditions as these, it would seem to be safe to regard the speed of the *Mangrove* in traveling toward the *Indiana* to be not substantially in excess of what her commander calls her ordinary speed of 6 knots an hour (add., 116, q. 98).

THE DISTANCE AT 6.45.

(3) How far were the vessels apart when the *Indiana* fired her gun at 6.45?

Captain Taylor gives the distance as close aboard, one-quarter to one-half mile (add., 70).

Yeoman Murray, on the *Mangrove*, says it was about 300 yards or a seventh of a mile (add., 95, q. 45).

Lieutenant Dawson thinks that it was at least 1 mile,

possibly more (add., 28, qq. 239, 240). Mallery puts it at about 2,000 yards, or 1 mile (add., 85, q. 22).

Captain Waller, who fired the gun, differs from all the other witnesses in saying (add., 268, q. 25) that it was approximately about 3 miles.

Private Blackiston estimates the distance at about 1,000 yards, or a half mile (add., 218, q. 5), and Apprentice Lindsay at about 500 yards, or a quarter of a mile (add., 229, q. 5).

The *Mangrove's* witnesses give the following distances:

Everett, 1 mile (add., 115, q. 91).

Dayton, 1 mile (add., 140, q. 42).

Palmer, 1 mile (add., 135, q. 58).

Overn, one-fourth mile (add., 156, q. 17).

Five witnesses say a mile and five from one-seventh to one-half mile. Everett did not see the *Indiana* until after the gun was fired. It was dark, and casual observations were likely to be erroneous. Captain Taylor was watching the approach to determine the time to fire the gun, and was the responsible officer It is safer to accept Captain Taylor's statement, "close aboard," meaning one-fourth to one-half mile, than the views of the others.

DISTANCE AS SHOWN BY SPEED.

Having now reviewed the evidence on these points, the distance may be calculated according to the contentions of the two parties.

The entire time between 6.07 and 6.45 was thirty-eight minutes. The *Indiana* was approaching the

Mangrove during all this time at a speed claimed by the *Indiana* to be 8 knots an hour and by the *Mangrove* 10½, arriving at 6.45 at a distance from the *Mangrove* claimed by the *Indiana* to be "close aboard," or not of importance in the calculation, and by the *Mangrove* as 1 mile.

The *Mangrove* was still for fifteen minutes according to the *Indiana*, and ten minutes according to the *Mangrove*, making a period of motion of twenty-three or twenty-eight minutes, respectively. She moved at the rate of 6 knots, the *Indiana* says; of 8 knots, the *Mangrove* says.

These data give the distance at 6.07.

The *Indiana's* figures are as follows:

The *Indiana*, 38 minutes, at 8 knots an hour	5.07
The *Mangrove*, 23 minutes, at 6 knots an hour	2.3
Total	7.37

The *Mangrove's* figures are:

The *Indiana*, 38 minutes, at 10½ knots	6.63
The *Mangrove*, 28 minutes, at 8 knots	3.73
Distance from *Indiana* to *Mangrove*, at 6.45	1
Total	11.36

The very great difference, over 54 per cent, shows how uncertain are these calculations as a means of testing the oral testimony as to things seen; for it is as a contradiction of the *Indiana's* testimony that the *Mangrove* relies on these conclusions.

Since this brief was in proof we find that the *Mangrove* contends for a greater distance than this—13.35 knots. This we accept in lieu of our own deductions

from the *Mangrove's* evidence as a more authoritative deduction. It makes far worse for the *Mangrove's* case than the lesser distance.

Before proceeding to discuss the effect of these figures, it will be best to examine the evidence upon the other points relied upon by the *Mangrove* to establish distance, first considering:

WHEN DAYTON SAW THE *INDIANA*.

(4) How long after starting did Ensign Dayton see the *Indiana?*

Ensign Dayton says (add., 138):

> Q. 16. How long was it after you landed on board the *Panama* before the vessel got underway again?
>
> A. Not more than ten minutes. After telling the captain that he was a prize, I went immediately to the bridge and started the engines ahead. Not seeing the *Indiana*, I hailed the *Mangrove* and asked what the bearings were, and they replied (I think, Mr. Palmer), "south-southwest." I headed the *Panama* south-southwest and I saw the smoke of the *Indiana*, and soon after I saw her fighting top.
>
> Q. 17. Why was it that you asked for these bearings?
>
> A. When I left the *Mangrove* Captain Everett told me that we would both proceed back to the *Indiana*, and I inquired what direction, in order to know how to head the *Panama*.
>
> Q. 18. How long was it after that you saw the *Indiana?*

A. I can not tell; the time was very short—five or ten minutes.

Q. 19. What did you first see?

A. The fighting top.

Q. 20. Where were you at the time you saw the fighting top?

A. On the bridge of the *Panama.*

This testimony is that he got under way in not more than ten minutes, that he then asked for directions, and after that in five or ten minutes saw the *Indiana's* fighting top. On cross-examination he says (add., 145):

Cross-q. 11. What was the first you saw of the *Indiana* after getting on the *Panama?*

A. I first saw the smoke and soon after her fighting tops.

Cross-q. 12. How long was this after you had gone on board of the *Panama?*

A. Five or ten minutes.

Cross-q. 13. How long after that before you saw the body of the vessel?

A. I am not sure.

Perhaps on this it will be contended that he saw the *Indiana* five or ten minutes after he got aboard the *Panama.* This would be before he got under way (see q. 16, just quoted), while he distinctly says that he saw the *Indiana* (q. 18) five or ten minutes after he got his directions, and that that was after he got under way.

His testimony, if he means that he saw the *Indiana*

fifteen or twenty minutes after he boarded the *Panama*, is in accord with the theory of those on the *Mangrove*.

Cadet Palmer (add., 134, qq. 53, 54) says that he saw the fighting top from the *Mangrove* about twenty minutes after starting. Overn saw the *Indiana* about half an hour after the capture of the *Panama;* saw her fighting top (add., 156, qq. 4, 5), and Hansen saw her ten or fifteen minutes after starting toward her (add., 164, qq. 5, 6).

These distances, all of them a little greater than Ensign Dayton's, accord with his theory, since the *Mangrove*, being lower than the *Panama*, would see the fighting top later.

It may be deduced from this testimony that the theory of the *Mangrove* is that Dayton, from the *Panama*, saw the fighting top of the *Indiana* about twenty minutes after the capture, or at 6.27. The *Indiana's* contention is that the *Indiana* was in sight all the time.

DISTANCE BETWEEN KNOWN HEIGHTS.

(5) Ensign Dayton attempts to show the distance between the *Panama* and the *Indiana* at 6.27 by giving the height of the *Panama's* bridge and of the *Indiana's* fighting top, and showing the distance by the standard tables when the fighting top first should come into view (add., 138, qq. 21, 22). This distance is 11½ miles. This he claims was the distance between the two vessels when he first saw the *Indiana* at 6.27.

Accepting this for the purpose of calculation, what was their distance at 6.07, on the *Mangrove's* theory of

the respective speeds? Between 6.07 and 6.27 the two vessels had moved:

The *Indiana*, twenty minutes, at 10½ knots	3.5
The *Mangrove*, ten minutes, at 8 knots	1.33
	4.83
Add the distance at 6.27, stated by Dayton	11.50
The distance at 6.07 is	16.33

This is the view of Commander Everett. He says (add., 112):

> No. 61 Q. How far would you consider that such a vessel would have to be away for nothing but smoke to be observed?
>
> A. I should say 15 or 16 miles, at least.

The *Mangrove's* contentions upon the evidence as to the distance at the time of capture may therefore be be stated as follows:

By Commander Everett's estimate and Ensign Dayton's calculation, the distance was 16.33 knots.

By calculation of the speed according to the *Mangrove's* evidence, the distance was 11.36 knots.

Before discussing the probabilities of either of these distances it is necessary to review the testimony offered as to possible signal distance, as well as in regard to the distance at which other objects may be seen.

THE LIMITS OF SIGNAL DISTANCE.

(6) It must be noted that there was no controversy at all on the subject of gun signals. It was not disputed that the *Mangrove's* guns could have been heard on the *Indiana*.

The witnesses on both sides differ as to visual signals.

Captain Taylor (add., 64) says that under the most favorable conditions signal distance is possibly 8 miles; probably from 6 to 8 under favorable conditions.

Captain Waller fixes it at 8, knowing an instance of a signal being read at about 8 miles, very close measurement (add., 269).

Captain Chadwick, testifying for the *New York* (add., 99), says:

> Q. 24. At what distance could you, with the glass which you used in observing the *Panama*, have read naval flag signals?
>
> A. I should say certainly 8 miles.

Dawson says 5 or 6 miles under favorable conditions (add., 10, q. 64), but does not state extreme distance (add., 10, q. 61); Mallery says, without having made special tests, about 5 miles (add., 81, q. 26; add., 79, q. 29); Dayton between 5 and 6 miles (add., 139, qq. 31, 32); Palmer 4½ to 5 miles (add. 125, qq. 21, 22).

Some of the enlisted men of the *Indiana* had known actual instances of long-distance signaling. Quartermaster Golden (add., 248, 249, q. 6) had read signals about 8 miles with a glass. Private Blackistone had read signals at a distance understood to be 7 miles (add., 218, q. 6).

Judge Locke, in the opinion in this case (Rec., 56), states that the consensus of opinion as to signal distance is that 5 or 6 miles is the average distance and 8

miles is testified to as the limit of vision in reading day signals. This is a confirmation of Captain Chadwick's and Captain Waller's testimony and of Captain Taylor's views that signals may be read at a distance of 8 miles under the most favorable conditions. These conditions existed here.

CONDITIONS FAVORABLE FOR SIGNALING.

Admiral Taylor says (add., 65):

> Q. What were the conditions that afternoon as to the atmosphere?
>
> A. My recollection is that it was favorable above the average, as far as clearness and distinctness of distant objects went; of this I am confident.

The sun was eighteen minutes above the horizon (it set at 6.25, add., 203); it was shining from behind the *Indiana* toward the *Mangrove* and under conditions favorable to the clearest possible vision of the *Mangrove* from the *Indiana*.

We quote again Admiral Taylor's testimony (add., 64, 65):

> Q. What are the most favorable circumstances for reading signals?
>
> A. With the sun behind the observer and tolerably low down, with clear conditions of atmosphere. The light as I described it, clear conditions of atmosphere, and not too much wind.
>
> Q. When you say "tolerably low down," what do you mean by that expression?
>
> A. If the sun is shining without any cloud as

low down as possible, but if slightly obscured by haze or clouds it should be an hour before setting; these would give the most favorable conditions.

Q. In other words, do you mean as much light as you can get with the sun entirely out of your way as far as its direct rays coming into your eyes go?

A. Something more than that; for if the sun is behind you and is very high, though more light is in the atmosphere, the sun does not shine so directly perpendicularly upon the signals as when it is low down, and the best point is where it is low, but not so low as to have taken away too much of the diffused light in the atmosphere.

Munson says (add., 193, q. 46), "The northward atmosphere was very clear; to the southward it was hazy;" and Waller (add., 266, q. 7), "The atmosphere was clear seaward; hazy toward land, but the *Indiana* was between the two ships (the *Mangrove* and the *Panama*) and the land."

It is a notable corroboration of this view as to the unusual clearness of the atmospheric conditions to find that the best qualified persons on the *Indiana* uniformly considered the distance less than that which necessarily results from calculating the speed of the vessels. Thus, Captain Taylor received the impression that the distance was $3\frac{1}{2}$ to 4 miles at the time of the capture (add., 65). Captain Waller considered the distance the same (add., 266, q. 9). Lieutenant Dawson estimated it at between 4 and 6 miles

(add., 7, q. 31) and Gunner Mallery at about 4 to 4½ miles (add., 79, q. 30).

We do not contend, in the light of all the evidence, that these estimates of distance are correct. The uniform underestimate of the distance strikingly indicates the clearness of the atmospheric conditions. It means that the two vessels looked much nearer than they were. Objects could be more clearly seen than usual. Signal distance on so clear a day, with the sun's reflection on the *Mangrove*, was much farther than under normal conditions and extended to the extreme signal distance of 8 miles, more than the distance between these vessels.

VISUAL DISTANCE OF OBJECTS AT SEA.

There is some general evidence as to distances at which some things can be seen at sea.

Admiral Taylor testifies as to the possible distance to see the direction of smoke from a gun (add., 64):

> Q. You spoke of being able to see the direction that the smoke took from the gun. If you could see anything at all, wouldn't you be likely to see the direction of it?
>
> A. Oh, no. At a distance of 8 or 10 miles I should say that it would be impossible to distinguish the direction of the tongue of smoke; it would be blurred with the horizon and the natural mist. I should say it would not be possible. You would see the smoke as a cloud, but not a tongue or jet, and its direction distinctly.

Commander Everett says that a large ship the size of the *Indiana* can be seen at a distance of 12 miles (add., 109, q. 22).

Cadet Palmer testifies that boats can be seen for 5 miles (add., 126, q. 30); the smoke of a gun about 10 miles, depending upon the size of the gun (add., 126, q. 31), but not the flash of a gun at this distance and not unless within 6 miles. If very near you might see the direction of the smoke (add., 130, qq. 8–13).

Dayton thinks that a flash could be seen at a distance of 6 miles (add., 130, qq. 8–13).

THE THEORIES OF DISTANCE TESTED.

Having thus tediously gathered together the data available from the record, some conclusions may now be reached.

I. Commander Everett's and Ensign Dayton's distance of 16 miles.

A very slight calculation will show that this is impossible. The theory is that at 6.27 the two vessels were $11\frac{1}{2}$ miles apart, but met at 6.45. To find the rate per hour at which the vessels must have traveled to do this, it is only necessary to do a sum in the rule of three:

$$11.5 : 18 :: x : 60$$

x here equals the number of miles per hour to be made by the two vessels and equals 38.33.

Allowing a little more speed for the *Indiana* than that for the *Mangrove*, this would be for the *Indiana* about 20 knots and for the *Mangrove* about 18.33 knots an hour. These rates are beyond any suggestion of possible speed. This is a complete *reductio ad absurdum*.

It is none the less impossible if we suppose the time

when they were 11.5 miles apart as 6.17, instead of 6.27. This would give twenty-eight minutes for the vessels to come together, and stating the proportion again:

$$11.5 : 28 :: x : 60$$

x here equals 24.64 knots per hour, or fairly apportioning it, a speed of 13.5 for the *Indiana* and 11.14 for the *Mangrove*, rates far in excess of anything testified to as possible.

The Dayton calculation and the Everett estimate may therefore be wholly eliminated. In doing this, confidence must be seriously shaken in the general soundness of their conclusions on other points in the case.

SPEED CALCULATION OF 13.35 MILES.

II. This distance is to be tested by what was actually seen by the witnesses on the *Indiana*. It may then be compared with what Commander Everett and Cadet Palmer say as to the visual distance of various objects. From such comparison we must conclude that the *Indiana* was much nearer to the *Mangrove* and *Panama* than 13.35 miles at this time, as claimed in the *Mangrove's* brief, or even 11.36 miles.

There is no doubt from the testimony of the crowd of witnesses from every station on the ship, gathered from all parts of the world, that the *Mangrove* and *Panama* were distinctly seen from the *Indiana;* that the boat was seen in the water; that the flash of the gun was seen; that the smoke was seen not only when rising from the gun after the shot, but when shooting

out in a horizontal line from the mouth of the gun, at the very moment of the shot.

But Commander Everett says (add., 109, q. 22), and no one disputes him, that 12 miles is the distance at which a large ship like the *Indiana* can be seen at sea. Ensign Dayton's calculations confirm this. Yet the *Indiana* saw not only the *Mangrove*, a far smaller vessel, but a boat in the water. The conclusion can not be escaped that the distance was very much less than 13.35 miles.

Palmer gives 5 miles as the limit for seeing a boat (add., 126, q. 30). It can not be doubted that the *Indiana* saw the boat. He, and Dayton as well (add., 130, qq. 8–13), give the limit of seeing gun smoke as 10 miles; the flash at 6 miles; and Palmer says to see the direction of the smoke you must be very near. But we prove conclusively that all of these things were seen by witnesses. Doubt of this can not remain in the face of the proof. Thus, accepting the estimates of our opponents, the *Indiana* could not have been at a distance greatly in excess of 6 miles. The *Indiana* saw things which our adversaries admit could only be seen when within signal distance.

Our deduction of 11.36 miles, repudiated by opposing counsel's estimate of 13.35 miles from their evidence, is clearly too far for the *Indiana* to have seen what she is shown beyond doubt to have seen. As the *Mangrove* claims a greater distance, it is only the more patent impossibility that at such greater distance the *Indiana* could have seen what she actually saw. Both distances must be rejected.

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III. The evidence outside the speed calculation would indicate a closer distance than 7.37 miles, but the conditions for observation were evidently fully equal to those existing usually at not over 4 to 5 miles, the ordinary distance for good signaling. Eight miles, we have seen, is extreme signal distance under favorable circumstances. The *Indiana* had unusual conditions and could have read signals at the distance thus ascertained.

The *Indiana's* contention is proved by the concurrent opinion of officers and men of the *Indiana*, experienced in signaling, on deck and on bridge, from captain to apprentice, based on things seen at the time, that signal flags hoisted on the *Mangrove* at 6.07 could have been read from the *Indiana*. The calculation from speed and distance involves too many uncertain factors to be of positive value in deciding this issue; yet whatever be its value it aids to confirm the *Indiana's* overwhelming testimony by showing that the most favorable atmospheric conditions existed and that the *Indiana* was within recognized visual signal distance under such conditions.

PART V.

SOME MINOR OBJECTIONS.

THE *PANAMA'S* COLORS.

The argument will doubtless be made that signals could not have been read on the *Mangrove* from the *Indiana* at the time of the capture because, they say, the *Panama's* colors were not distinctly seen from the *Indiana*. The following signals were exchanged between the *New York* and *Indiana* (rec., 37): "5.52, *New York* to *Indiana*, 'What colors does strange vessel carry?' 5.55, *Indiana* to *New York*, 'Can not see.'"

When the first of these signals was made the *Indiana* was moving toward the *Panama*. Taylor (add., 68) says she continued to move toward the *Panama* between 5.55 and the moment of capture, 6.07, twelve minutes. If moving at 10.5 knots an hour, as claimed by the *Mangrove*, she had then moved 2.1 knots nearer than when she signaled that she could not see the vessel's colors. If traveling at 8 knots an hour, she had moved 1.6 knots. It therefore does not follow at all that the failure to see the *Panama's* colors at 5.55 shows that the colors could not have been seen or signals read at 6.07. The evidence is not indeed conclusive, since a more deliberate study of signals with a glass might have read the signals, even when a hasty glance, under the conditions momentarily existing, as shown by the time elapsing between the question and answer, failed to make out the ensign.

The advantage, too, is in favor of reading regular signal flags. Captain Taylor (add., 62) states the care taken of signal flags:

> Q. What is the rule on board ship in regard to the care taken of the signal flags?
>
> A. They are especially cared for in lockers especially prepared, usually lined with zinc or other means of making them tight, and are never left out when not in use, but are rolled up quickly and put in their pigeon holes in lockers and the tops shut down at once. This is for the purpose of keeping their colors bright, and so that the smoke from the furnaces and the dampness will not fade them. This is possible for the reason that these signals are displayed at the masthead but for a moment or two, as a rule, and are then put away again; they do not hang like the permanent flags of ship through the day and sometimes through the night, such as the admiral's flag at the masthead or the captain's narrow pennant, or during the daytime as the national colors, all of which become much stained, discolored, and faded, except special ones, which are kept for Sunday use and decoration of ship.

Commander Everett (add., 119, q. 138–141) says, also:

> No. 138. Q. How large was the ensign of the *Panama?*
>
> A. I could not give it in feet and inches, but it was the average-sized ensign carried by merchant steamers.
>
> No. 139. Q. What was the comparison with the large flags used in signaling?

A. I should say it was smaller.

No. 140. Q. How much smaller?

A. That would depend upon the kind of flag. If you mean the large signal flags in use, it was not over half the size.

It is true that Ensign Dayton makes the *Panama's* ensign 12 feet long (add., 140, q. 34), but this can hardly be accepted as correct in the face of Commander Everett's testimony. "The usual set of signal flags" furnished in the Navy are about 8 feet by 11 (add., 129, q. 48).

Some effort was apparently made to show that the gunshot from the *Indiana* at 6.45 was fired as soon as the *Indiana* saw that the ensign on the *Panama* was still flying. That attempt wholly failed.

Admiral Taylor explains the reason for firing a shot from the *Indiana* (add., 61):

> I fired it, for my own part, because I feared she would escape from the *Mangrove*. Officers who were on the bridge with me spoke of her colors not being down. This was, as I remember, an added reason for firing a gun, but, primarily, I gave an order to fire because I feared that the *Mangrove* had not completed the capture, or, having completed it, the vessel might still escape her.

Lieutenant Decker in preparatorio testifies (Rec., 40, q. 4):

> When the *Panama* headed toward us the colors in her ensign could be distinguished.

Quartermaster Golden mentions incidentally that he

made out the flag of the *Panama* before the capture (add., 246):

> Interrogatory 4. If so, state whether you saw the Spanish steamer *Panama*, and if so, state what were the relative positions of the *Panama*, the U. S. S. *Mangrove*, and the U. S. S. *Indiana* when you first saw the *Panama?*
>
> A. I did see the *Panama.* It was about sunset; we were to the southward of the *Panama*, and the *Mangrove* was to the northward of us, and between us and the *Panama*, and I made out her Spanish flag through the long glass from the masthead.

That the *Panama's* colors were not so distinct as to be altogether easy to make out is shown by the statement of Yeoman Murray (add., 91, q. 20), looking from the *Mangrove*:

> The only conversation I had with Mr. Cosgrove to my knowledge was, in the beginning of the affair, in regards to him calling me on the bridge and handing me the glasses and asking me if I could make out the flag of this ship; and as I said before, on two occasions I looked through the glasses and both times I was unable, and so was he, to make out the flag of the ship.

The weight of the evidence altogether leads to the conclusion that the *Panama's* ensign was smaller and dirtier than signal flags and that it was made out to be a Spanish flag from the masthead of the *Indiana* prior to capture.

PERSONAL CONTRADICTIONS.

Testimony has been taken bearing upon disputed questions of veracity between Chaplain Cassard and Yeoman Murray on the one hand and some of the officers and men of the *Mangrove* on the other. The statement is made by Chaplain Cassard (add., 44) that a report was made on the *Mangrove* of the *Indiana* being in sight at the time of capture. This report is denied by Commander Everett (add., 108, q. 11) and others (add., 123, 124, q. 8; 176, qq. 53, 54; 185, q. 27). Various persons on the *Mangrove* say (Ralston, rec., 25, q. 10; Everett, add, 118., q. 124; Palmer, add., 124, q. 11; Cosgrove, add., 172) that both Cassard and Murray (rec., 35, q. 10; add., 172) stated, contrary to their present testimony, that the *Indiana* was not in sight. These statements are denied by Cassard (add., 45, 53, 57) and Murray (add., 91, qq. 19–21). We do not think that anything is added to the solution of the issues in this case by any elaborate discussion of these disputed questions of veracity. They stand on substantially an equal footing. Allegations are made by those intererested on one side directly contrary to those made by parties interested on the other. The statements of the witnesses on each side rest on about the same kind of evidence. A conclusion in the case may be reached on the other evidence without going into the details of a controversy based probably on misunderstanding on both sides.

Part VI.

QUESTIONS OF LAW.

With the settlement of the issues of fact, but little remains for decision. If the court finds that visual signals could have been exchanged between the two vessels, as the *Indiana* claims, no question of law arises. If the court finds that visual signals hoisted on the *Indiana* could not be read on the *Mangrove*, there are two simple questions of law.

I. If signals hoisted on the *Mangrove* could have been read from the *Indiana*, but signals hoisted on the *Indiana* could not have been read from the *Mangrove*, is the *Indiana* entitled to share?

II. If visual signals could not have been read between the two vessels in either direction, but gun signals could have been understood, is the *Indiana* entitled to share?

SIGNALS FROM *MANGROVE* TO *INDIANA*.

The statute (R. S., § 4632) says:

> All vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; * * *.

This act in terms makes the test whether the vessel claiming was within signal distance of the vessel making the capture, not whether the capturing vessel was within signal distance of the vessel claiming. These would be the same thing in ninety-nine per cent of all

cases. But the test, under the terms of the statute, is the ability of the capturing vessel to signal the other vessel to its aid.

Admiral Taylor very clearly states the reason of the law in language which has already been quoted (add., 73):

> But I can answer that very clearly by saying that I regard signal distance as being in the nature of things that distance at which you can perceive the calling of a consort for assistance and to be near enough to be in position to render it within a reasonable time.

The purpose of this law is to give a share of prize money to all vessels which might have been of assistance to the captor, if needed, by being in position to be summoned to active aid. That does not involve the ability to respond by a visible signal. The call is made by signal; the response by action.

GUN SIGNALS.

It has already been shown that gun signals are officially recognized in the Navy as a form of signaling, and officers have stated that while the use is unusual, they could have understood such signals. It has been proved absolutely that the sound of gun fire from the *Mangrove* was distinctly heard on the *Indiana* and that gun signals could have been freely exchanged between the *Mangrove* and the *Indiana* at this time. The *Mangrove* could have called the *Indiana* to her aid with gun signals. There is no attempt to prove that the vessels were outside of gunshot hearing.

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The only answer to this contention is proof that the use of gun signals is unusual, an answer quite irrelevant to the question. The right conclusion is that the *Indiana* was within signal distance of the *Mangrove* at the time, whether visual signals could have been read or not.

The crucial test is, could the *Mangrove* have summoned the *Indiana* to assistance? The law makes no question as to the particular form of summons used. A signal by sound is as good as a signal by sight, so long as it accomplishes the purpose.

Without regard to visual signals, the *Indiana* must be admitted to share upon the undisputed fact that gun signals from the *Mangrove* would have called the *Indiana* to aid. Upon this ground, as well as on the proof of visual signal distance, we submit that the decree should be reversed.

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